IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36077

STATE OF IDAHO,	)	**2010 Unpublished Opinion No. 398**
	)	
Plaintiff-Respondent,	)	**Filed: March 24, 2010**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
ROBERT D. COLEMAN,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Defendant-Appellant.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. Steven C. Verby, District Judge.

Judgment of conviction and sentence for trafficking in methamphetamine, affirmed.

Michael D. Kinkley, Spokane, Washington; Dan B. Johnson, Spokane, Washington, for appellant. Michael D. Kinkley argued.

Hon. Lawrence G. Wasden, Attorney General; John C. McKinney, Deputy Attorney General, Boise, for respondent. John C. McKinney argued.

GUTIERREZ, Judge

Robert D. Coleman appeals from his judgment of conviction for trafficking in methamphetamine. Specifically, he contends for the first time on appeal that the erroneous admission of other crimes evidence at trial and the warrantless search and seizure of his vehicle prejudiced him and resulted in fundamental error warranting a new trial. For the reasons set forth below, we affirm.

I.
BACKGROUND

In June 2007, Narcotics Detective Flavel went to the residence of Coleman Hamilton, a friend of Coleman's, on a "proactive patrol." Hamilton had previously been arrested for manufacturing methamphetamine. Upon arriving at Hamilton's residence, Detective Flavel walked toward a small shed where he saw Coleman and another man sitting on chairs inside the

shed. The two men told Detective Flavel that Hamilton was working on his vehicle around the corner of the shed. While near the shed, Detective Flavel detected a chemical smell and saw "heat"[1] in a cardboard box, which made him suspect that the shed was being used as a lab for methamphetamine. Detective Flavel walked around the corner to talk to Hamilton, and while doing so, looked back toward the shed and saw Coleman emptying his pockets either by throwing items on the ground or into the cardboard box. Detective Flavel then heard things being moved around in the shed, and he moved back to the front of the shed with Hamilton. He asked Coleman and the other man to step out of the shed while they awaited the arrival of additional officers.

When the other officers arrived, Detective Flavel entered the shed and observed what he knew to be components of a methamphetamine lab. In the cardboard box that was in the shed near Coleman, officers found a fuel can, three one-gram sandwich bags of methamphetamine, digital scales, sandwich baggies, a beaker, heat, plastic tubing, $10 in cash, and a receipt for the purchase of ephedrine by Coleman. Other items found inside the shed included crates containing the components for making methamphetamine, a Bunsen burner, a jar with methamphetamine in it, four empty packages of ephedrine, yellow gloves, filters with iodine stains, and a large box of muriatic acid. According to Detective Flavel, all of the components for manufacturing methamphetamine were present in the shed. Coleman's truck was seized for forfeiture for the reason that it was used to transport precursors of methamphetamine, and was taken to the sheriff's impound lot where an inventory search of the truck was done the next day. The results of the inventory search of the truck included a coffee filter with methamphetamine on it, yellow cups matching cups found in the shed for the extracting process, and several receipts for clear tubing, paper matches, gloves like the ones found in the shed, and pseudoephedrine.

During Coleman's trial, the prosecutor asked Detective Flavel if anything on Hamilton's property could be attributed to Coleman. Detective Flavel responded that there were two wave runners and a wave runner trailer, and that the trailer was registered to Coleman. A jury found Coleman guilty of trafficking in methamphetamine in violation of Idaho Code § 37-2732. Coleman filed a motion for a new trial, which was denied after a hearing. Coleman now appeals from his judgment of conviction.

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[1] The "heat" was a fuel can.

II.

ANALYSIS

A. Rule 404(b) Evidence

Coleman asserts for the first time on appeal that the state violated Idaho Rule of Evidence 404(b), which led to a fundamentally unfair trial. Specifically, he argues that the rule was violated when the state injected other crimes evidence into the case without prior notice. Coleman claims the state did this when Detective Flavel testified that the wave runners were stolen, thereby alluding to Coleman being a thief and being in possession of stolen property, and when the state brought up the question of the stolen wave runners by asking Coleman if he had written a letter to Hamilton from jail telling him that if he did not take the hit for the meth lab that he would turn him in for the stolen wave runners.

Generally, this Court does not consider issues that are presented for the first time on appeal. *State v. Yakovac*, 145 Idaho 437, 442, 180 P.3d 476, 481 (2008); *State v. Fodge*, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992). However, we may consider fundamental error in a criminal case, even though no objection was made at trial. *State v. Rozajewski*, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997). Fundamental error has been defined as error which goes to the foundation or basis of a defendant's rights, goes to the foundation of the case or takes from the defendant a right which was essential to his or her defense and which no court could or ought to permit to be waived. *State v. Babb*, 125 Idaho 934, 940, 877 P.2d 905, 911 (1994).

Coleman asserts this assignment of error for the first time on appeal as there was no objection at trial to the introduction of the evidence at issue. Idaho Rule of Evidence 404(b) provides in pertinent part that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Testimony regarding the wave runners first arose on direct examination when the prosecutor asked Detective Flavel:

> Q: Did you find anything else on that property that you could attribute to Mr. Coleman?
> A: There was a wave runner trailer and two wave runners. The wave runner trailer was registered to Mr. Coleman.

Later, on cross-examination, the following interchange occurred between defense counsel and Detective Flavel:

> Q: All right. And then to verify one last thing and I'll be done, Detective Flavel. You mentioned a wave runner trailer and two wave runners. Did you verify that

the trailer itself, not the license plate but the trailer itself belonged to Mr. Coleman?
A: From what I remember there was no serial numbers on the trailer but the license plate that was attached to the trailer was registered to Mr. Coleman.
Q: And what about the wave runners? Did you ---
A: The wave runners were stolen and they were actually registered to some people out of Washington.
Q: So [to] the best of your knowledge the only thing that belonged to Mr. Coleman was the license plate on that.
A: Correct.
Q: Okay.

After Coleman testified, the prosecuting attorney asked him on cross-examination: "Did you ever tell--did you ever write a letter to Mr. Hamilton that said that he needs to take the hit for this meth lab or you're gonna turn him in for the stolen wave runners?" Coleman responded that this was not true, and the subject never came up again.

Instructive on the question of whether error in the admission of Rule 404(b) evidence rises to the level of fundamental error is *State v. Cannady*, 137 Idaho 67, 44 P.3d 1122 (2002). There, Cannady was convicted of the crimes of lewd conduct with a child under sixteen years of age, and sexual abuse of a child under sixteen years of age. On appeal, he challenged the admission into evidence of a book titled, The Child Abuse Industry, found in his camper. The book contained notations indicating Cannady had been previously investigated, charged, and convicted of child sexual abuse. The issue was thus framed as to whether the book's admission into evidence constituted fundamental error which could be reviewed on appeal even though no proper objection was made below. The Supreme Court held that an abuse of discretion in admitting Rule 404(b) evidence constitutes a trial error and does not go to the foundation of the case or take from the defendant a right which was essential to the defense. *Cannady*, 137 Idaho at 72-73, 44 P.3d at 1127-28. The Supreme Court pointedly stated: "We express no opinion upon whether admitting the book with the notations would have been an abuse of discretion. We merely reject the invitation to address the issue because there was no objection and its admission did not constitute fundamental error." *Id.* at 73, 44 P.3d at 1128. Here, Coleman never objected to the admission of the evidence below. As a result, *Cannady* dictates that this assignment of error is not reviewable on appeal.

B. Inventory Search

Coleman further asserts for the first time on appeal that the admission of the evidence found in the warrantless search and seizure of the truck was in violation of the Fourth

Amendment. Specifically, Coleman argues that there was no probable cause to believe that the truck was used in violation of I.C. § 37-2744(b)(4).[2] A challenge to the admissibility of evidence that was allegedly illegally seized must be made by a motion to suppress before trial, or any objection to the admissibility of evidence on that ground is waived. *State v. Segovia*, 93 Idaho 594, 597, 468 P.2d 660, 663 (1970). *See also* I.C.R. 12(b)(3), 12(f) (suppression motions must be raised prior to trial or are waived absent relief granted for cause shown). When there is no motion to suppress or timely objection to the evidence, the issue of its admissibility cannot be raised for the first time on appeal. *Segovia*, 93 Idaho at 597, 468 P.2d at 663.

Here, Coleman's appointed counsel filed a motion to suppress all the evidence found in the vehicle for the reason that the search of Coleman's vehicle was illegal. However, the hearing on the suppression motion was vacated by defense counsel and there was no further action in regard to the suppression motion. Because there was never a hearing on the motion to suppress, there is no evidentiary basis for the parties to argue, or for this Court to determine, whether the search and seizure of his truck was constitutional. Any objection to the admissibility of the evidence was waived by Coleman as he failed to pursue a hearing and obtain a ruling on his motion to suppress based on the allegedly illegal impoundment of his truck. *See State v. Kelly*, 106 Idaho 268, 277, 678 P.2d 60, 69 (Ct. App. 1984).

III.

CONCLUSION

Coleman is procedurally barred from challenging the admission of evidence at trial and the warrantless search and seizure of his vehicle for the first time on appeal. Accordingly, we affirm.

Chief Judge LANSING **CONCURS.**

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[2] Because process was not issued for the truck, Coleman argues that the seizure must have been premised on one of the four exceptions outlined in I.C. § 37-2744. It provides in relevant part:

> (b) Property subject to forfeiture under this chapter may be seized by the director, or any peace officer of this state, upon process issued by any district court, or magistrate's division thereof, having jurisdiction over the property. Seizure without process may be made if:
>
> > (4) Probable cause exists to believe that the property was used or is intended to be used in violation of this chapter.

I.C. § 37-2744(b)(4).

Judge Pro Tem SCHWARTZMAN, **SPECIALLY CONCURRING**

I concur in the opinion of this Court, but write specially to note that appellant's brief does raise several intriguing issues. Unfortunately, the lack of any record below giving some context to these issues precludes us from a review.

Suffice it to say, such should not be the case within the venue of the Uniform Post-Conviction Procedure Act, Idaho Code § 19-4901, *et seq.* Therein, the parties may at least confront and explore the so-called *(in)advertent blurt*, allusion to the *letter* that never was, and the *vacated* motion to suppress.

I suspect that the state will be "slightly" more challenged below than it was on this appeal. Further, this jurist sayeth naught.